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TESTIMONY OF

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Before the

SUBCOMMITTEE ON FINANCIAL INSTITUTIONS AND CONSUMER CREDIT

of the

COMMITTEE ON FINANCIAL SERVICES

of the

U. S. HOUSE OF REPRESENTATIVES

March 14, 2002

Statement required by 12 U.S.C. 250:

The views expressed herein are those of the Office of the Comptroller of the Currency and do not necessarily represent the views of the President.

Introduction

Chairman Bachus, Ranking Member Waters, and members of the Subcommittee,
I appreciate this opportunity to discuss with you ways in which we can reduce unnecessary regulatory burden on America's banking system, and to express the views of the Office of the Comptroller of the Currency (OCC) on the Financial Services Regulatory Relief Act of 2002 (FSRR Act).[1] Let me also thank Ms. Capito, for sponsoring a bill that includes sensible and appropriate regulatory burden relief for national banks and other financial institutions.

Effective bank supervision demands that regulators achieve a balance among several competing, but equally important, objectives. These objectives include fostering banks' ability to conduct their business profitably and competitively, free from burdensome constraints that are not necessary to further the purposes of the banking laws. Unnecessary burdens drive up the costs of doing business for banks and their customers and prevent banks from effectively serving the public. Periodic review of the banking statutes and regulations is an essential means of ensuring that banks are not needlessly encumbered by requirements that are no longer appropriate for today's banking environment.

The OCC itself has a continuing commitment to review its regulations and make changes, consistent with safety and soundness, to enable banks to keep pace with product innovation, new technologies, and changing consumer demand. We also constantly reassess the effectiveness and efficiency of our supervisory processes to focus our efforts on the institutions and activities that present the greatest risks, and to reduce unnecessary burdens on demonstrably well-run banks. However, the results that Congress can achieve by removing or reducing regulatory burden imposed by Federal statutes can be broader and more far-reaching than regulatory changes. The FSRR Act contains a number of important provisions that will help national banks remain profitable and competitive by eliminating unnecessary burden. The first portion of my testimony will highlight several of these provisions.[2]

A second, and fundamentally important, objective of our supervision is to promote and maintain the safety and soundness of the banking system. The FSRR Act also contains provisions that further this objective, and I will mention a few of these provisions in the second section of my testimony. I will also take this opportunity to briefly discuss certain additional legislative changes that you may wish to consider as the legislation is developed, which would help promote safety and soundness.

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[1] As of the time this testimony was required to be submitted, the FSRR Act had not been formally introduced. Accordingly, the views of the OCC set forth in this testimony are based on the March 5, 2002 Discussion Draft of the FSRR Act, including certain changes that we have been advised will be made to the draft. References to sections of the Act are based on the March 5th Discussion Draft. The OCC will be pleased to work with Subcommittee staff, as appropriate, as the legislation progresses.

[2] A detailed section-by-section review of the provisions of Title I, IV, and VI of the March 5, 2002 Discussion Draft of the FSRR Act, which are relevant to the OCC's responsibilities, is attached to this testimony as an appendix.

National Bank Provisions

The FSRR Act contains several provisions that would streamline and modernize aspects of the corporate governance and interstate operations of national banks. The OCC strongly supports these provisions.

For example, section 101 of the Act relieves a restriction in current law that makes it difficult for some national banks to operate as "Subchapter S" corporations. The National Bank Act currently requires all directors of a national bank to own at least $1,000 worth of shares of that bank or an equivalent interest in a bank holding company that controls the bank. The requirement means that all directors must be shareholders, making it difficult or impossible for some banks to comply with the 75-shareholder limit that defines eligibility for treatment as a Subchapter S corporation. These banks are thus ineligible for the benefit of Subchapter S tax treatment, which avoids a double tax on the bank's earnings. Community banks suffer most from this result.

Section 101 authorizes the Comptroller to permit the directors of banks seeking Subchapter S status to satisfy the qualifying shares requirement by holding a debt instrument that is subordinated to depositors and general creditors of the bank. The holding of such an instrument would not cause a director to be counted as a shareholder for purposes of Subchapter S. The subordinated liability is closely equivalent to an equity interest, however, since the directors could only be repaid if all other claims of depositors and nondeposit general creditors of the bank were first paid in full, including the claims of the FDIC, if any. The new requirement would thus ensure that directors retain the requisite personal stake in the financial soundness of their bank.

Similarly, section 102 of the Act eliminates a requirement in current law that precludes a national bank from prescribing, in its articles of association, the method for election of directors that best suits its business goals and needs. Unlike most other companies and unlike state banks, national banks cannot choose whether or not to permit cumulative voting in the election of their directors. Instead, current law requires a national bank to permit its shareholders to vote their shares cumulatively. Section 102 provides that a national bank's articles of association may permit cumulative voting. This amendment would conform the National Bank Act to modern corporate codes and provide national banks with the same corporate flexibility available to most corporations and state banks.

Section 401 of the Act also simplifies the requirements that apply to a national bank that wishes to expand interstate by establishing branches *de novo*. Under the Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994, interstate expansion through bank mergers generally is subject to a state "opt-out" that had to be in place by June 1, 1997. Under the time frames set by the statute, interstate bank mergers were permissible in all 50 states as of September 2001. By contrast, *de novo* branching still requires states to pass legislation to affirmatively "opt-in" to permit out-of-state banks to establish new branches in the state.

This effect of current law is to require that, in many cases, national banks must structure artificial and unnecessarily expensive transactions in order to establish a new branch across a state border -- which in some cases, is simply across town in a multi-state metropolitan area. Section 401 repeals the requirement that a state expressly must adopt an "opt-in" statute to permit the *de novo* branching form of interstate expansion for national banks and contains parallel provisions for state member and non-member banks. National banks and their customers would benefit significantly by this change, which would permit a bank to freely choose which form of interstate expansion is most efficient for its needs and customer demands.

Safety and Soundness Provisions

The FSRR Act also contains a number of provisions that further the objective of promoting and maintaining the safety and soundness of the banking system. One of the most important of these provisions (section 406 of the March 5, 2002 Discussion Draft), expressly authorizes the Federal banking agencies to enforce written agreements and conditions imposed in writing in which an institution-affiliated party or controlling shareholder agrees to provide capital to the depository institution. This provision would supersede recent Federal court decisions that conditioned the agencies' authority to enforce such conditions or agreements on a showing that the non-bank party to the agreement was "unjustly enriched." These changes will enhance the safety and soundness of depository institutions and protect the deposit insurance funds from unnecessary losses.

The Act also contains two provisions that promote safety and soundness by providing the Federal banking agencies with greater flexibility to manage resources more efficiently and deal more effectively with problem situations. Current law mandates that most banks be examined on-site on prescribed schedules. This can, in certain circumstances, interfere with the ability of the banking agencies to concentrate their supervisory oversight on deteriorating or problem institutions. Section 601 of the bill would permit the agencies, when necessary for safety and soundness purposes, to adjust their mandatory examination schedules to concentrate resources on particularly troublesome institutions.

Current law also provides for criminal penalties to be imposed on a Federal bank examiner who examines a bank from which the examiner receives an extension of credit, including a credit card issued by that institution. This limits the flexibility of the OCC and the other banking agencies to assign examiners to particular institutions or examination teams, even if the examiner's skills or expertise would contribute materially to the examination. Section 602 provides that Federal banking agency employees may have credit cards without disqualification or recusal, but subject to the safeguard that the cards must be issued under the same terms and conditions as cards issued to the general public.

Additional Safety and Soundness Enhancements

The OCC has identified several additional areas in which amendments to current law would enhance the banking agencies' safety and soundness authority, reduce risk to the deposit insurance funds, and facilitate our enforcement efforts when wrongdoing does occur. We

would be happy to work with the other banking agencies to further develop these recommendations and with Subcommittee staff to facilitate inclusion of the agencies' recommendations in the FSRR Act as it is developed through the legislative process.

Under the Change in Bank Control Act (CBCA)[3], all acquirers of insured depository institutions are required to provide notice to the appropriate Federal banking agency before proceeding with an acquisition. The CBCA gives the agency a specified time period within which to object to the transaction and specifies several bases on which the agency may disapprove a change in control notice. It does not, however, expressly permit the agency to impose conditions on the institution in connection with the agency's failure to object to an acquisition of control. While we think the ability to impose conditions designed to ensure the safety and soundness of the bank being acquired may be fairly inferred from the purpose of the statute, in order to eliminate any ambiguity, we recommend that the CBCA be amended to expressly permit the appropriate Federal banking agency to impose conditions it determines advisable for safety and soundness reasons, in connection with its decision not to pose objection to a CBCA notice.

We also recommend amending the CBCA so that acquirers of entities possessing dormant bank charters would be subject to the same standards and conditions -- including participation by the FDIC -- as are required when an applicant seeks a *de novo* bank charter. In such a case, acquirers are effectively buying a bank charter without the requirement for prior approval and without the scope of review that the law imposes when applicants seek a new charter, even though the risks presented by the two sets of circumstances may be substantively identical.

Another change that we would support is to clarify that an appropriate Federal banking agency may issue cease and desist orders against an insured depository institution or an institution-affiliated party who violates conditions imposed by agreements made with another appropriate Federal banking agency. This issue can arise, for example, when a bank that is subject to requirements imposed by one agency in connection with an application or an enforcement action, converts its charter so that it is regulated by a different agency. Another example occurs when the FDIC imposes conditions in connection with granting deposit insurance but the FDIC is not the appropriate Federal banking agency for the insured bank, e.g., a national bank or a state member bank.

In addition, we recommend amending the FDIA to remove the "knowing or reckless" element from the definition of "institution-affiliated party." Under current law, an accountant or other independent contractor of an insured depository institution may be subject to sanctions as an institution-affiliated party in an administrative enforcement action only if the accountant's (or other independent contractor's) wrongful conduct was "knowing or reckless." Accountants who serve as independent contractors to insured depository institutions play a key role in keeping institutions' books and records accurate. In recent years, banking regulators have seen an increase in audit and internal control deficiencies at many insured depository institutions, some of which have caused significant operating losses and led to failures of institutions. Elimination of the "knowing or

[3] 12 U.S.C. § 1817(j).

reckless" standard would remove a significant impediment to the agencies' ability to hold these individuals and firms accountable for violations of law, breaches of fiduciary duty, or unsafe or unsound practices.

Conclusion

Once again, Mr. Chairman, on behalf of the OCC, I thank you for your leadership in pursuing this legislation. As I have indicated, the OCC supports the Act and believes that many of its provisions will go far to promote the objectives I have described today. In those areas where we have recommended that you consider additional amendments, we would be pleased to work with your staff to develop appropriate legislative language for the Subcommittee's consideration.

I am pleased to have had this opportunity to provide our views on this important initiative, and I would be happy to answer any questions you may have.

APPENDIX

DISCUSSION DRAFT
MARCH 5, 2002
"THE FINANCIAL SERVICES REGULATORY RELIEF ACT OF 2002"

SUMMARY AND COM MENTS
OF THE
OFFICE OF THE COMPTROLLER OF THE CURRENCY
ON TITLES I, IV, AND VI

TITLE I -- NATIONAL BANK PROVISIONS

Sec. 101. National Bank Directors.

SUMMARY: This section would amend section 5146 of the Revised Statutes of the United States (12 U.S.C. § 72) to provide more flexible requirements regarding director qualifying shares for national banks operating, or seeking to operate, as Subchapter S corporations. The National Banking Act currently requires all directors of a national bank to own "shares of the capital stock" of the bank having an aggregate par value of at least $1,000, or an equivalent interest, as determined by the Comptroller, in a bank holding company that controls the bank. The amendment would permit the Comptroller to allow the use of a debt instrument that is subordinated to the interests of depositors and other general creditors to satisfy the qualifying shares requirement for directors of national banks seeking to operate in Subchapter S status.

OCC COMMENTS: The OCC supports this change to the law. The requirement in current law creates difficulties for some national banks that operate in Subchapter S form. It effectively requires that all directors be shareholders, thus making it difficult or impossible for some banks to comply with the 75-shareholder limit that defines eligibility for the benefit of Subchapter S tax treatment, which avoids double tax on the bank's earnings. Such a subordinated debt instrument would be closely equivalent to an equity capital interest, since the directors could only be repaid if all other claims of depositors and nondeposit creditors of the bank were first paid in full, and would, therefore, ensure that directors retain their personal stake in the financial soundness of the bank. However, the holding of such an instrument would not cause a director to be counted as a shareholder for purposes of Subchapter S.

Sec. 102. Voting in Shareholder Elections.

SUMMARY: This section would amend section 5144 of the Revised Statutes of the United States (12 U.S.C. § 61). Section 5144 imposes mandatory cumulative voting requirements on all national banks. This law currently requires that, in all elections of national bank directors, each shareholder has the right to (1) vote for as many candidates as there are directors to be

elected and to cast the number of votes for each candidate that is equal to the number of shares owned, or (2) cumulate his or her votes by multiplying the number of shares owned by the number of directors to be elected and casting the total number of these votes for only one candidate or allocating them in any manner among a number of candidates. This amendment would permit a national bank to provide in its articles of association which method of electing its directors best suits its business goals and needs and would provide the OCC with authority to issue regulations to carry out the purposes of this section.

OCC COMMENTS: The OCC supports this change to national banking law. The Model Business Corporation Act and most states' corporate codes provide that cumulative voting is optional. This amendment would conform this provision of the National Bank Act to modern corporate codes and would provide national banks with the same corporate flexibility available to most state corporations and state banks.

Sec. 103. Simplifying Dividend Calculations for National Banks.

SUMMARY: This section would amend section 5199 of the Revised Statutes of the United States (12 U.S.C. § 60) to simplify the formula for calculating the amount that a national bank may pay in dividends. The current law requires banks to follow a complex formula that is unduly burdensome and unnecessary for safety and soundness. The proposed amendment would permit national banks to declare a dividend of so much of its undivided profits as deemed appropriate. The proposed amendment would retain certain safeguards in the current law that provide that national banks (and state member banks)[1] need the approval of the Comptroller (or the Federal Reserve Board in the case of state member banks) to pay a dividend that exceeds the current year's net income combined with any retained net income for the preceding two years. For purposes of the approval requirement, these Federal regulators would retain the authority to reduce the amount of a bank's "net income" by any required transfers to funds, such as a sinking fund for retirement of preferred stock.

OCC COMMENTS: The OCC supports this amendment. The amendment would reduce burden on banks in a manner that is consistent with safety and soundness. Among other things, the amendment would ensure that the OCC (and the Federal Reserve Board for state member banks) will continue to have the opportunity to deny any dividend request that may deplete the net income of a bank that may be moving towards troubled condition. Importantly, the amendment would not affect other safeguards in the National Bank Act (12 U.S.C. 56). These provisions generally prohibit national banks from withdrawing any part of their permanent capital or paying dividends in excess of undivided profits except in certain circumstances.

Moreover, other laws have been enacted in the last ten years that provide additional safety and soundness protections for all insured depository institutions. The proposed amendment also would not affect the applicability of these safeguards. These additional safeguards prohibit any insured depository institution from paying any dividend if, after that payment, the institution would be undercapitalized (see 12 U.S.C. § 1831o(d)(1)).

[1] See 12 U.S.C. 324 and 12 C.F.R. 208.5 generally applying the national bank dividend approval requirements to state member banks.

Sec. 104. Repeal of Obsolete Limitation on Removal Authority of the Comptroller of the Currency.

SUMMARY: This provision amends section 8(e)(4) of the Federal Deposit Insurance Act (FDIA) (12 U.S.C. § 1818(e)(4)) relating to the procedures for the removal of an institution-affiliated party (IAP) from office or participation in the affairs of an insured depository institution. With respect to national banks, current law requires the OCC to certify the findings and conclusions of an Administrative Law Judge to the Federal Reserve Board (FRB) for the FRB's determination as to whether any removal order will be issued. This amendment would remove this certification and FRB approval process and allow the OCC directly to issue the removal order with respect to national banks.

OCC COMMENTS: The OCC supports this amendment. This present system stems from historical decisions made by Congress on circumstances that are no longer applicable. Originally, the role of the OCC in removal cases was to certify the facts of the case to the FRB. The FRB then made the decision to pursue the case and made the final agency decision. At that time, the Comptroller was a member of the Federal Reserve Board and therefore participated in the FRB's final removal decision. However, Congress later removed the Comptroller from the FRB and gave the OCC the authority to issue suspensions and notices of intention to remove.

All of the Federal banking agencies, except the OCC, may remove a person who engages in certain improper conduct from the banking business. In the case of the OCC, the determination of whether to remove an individual from a national bank (and thus from the banking business) is made by the FRB. This amendment would give the Comptroller the same removal authority as the other banking agencies to issue orders to remove persons who have been determined under the statute to have, for example, violated the law or engaged in unsafe or unsound practices in connection with an insured depository institution. Like the other banking agencies, the Comptroller should make these decisions about persons who engage in improper conduct in connection with the institutions for which the Comptroller is the primary supervisor. This is a technical change to streamline and expedite these actions and has no effect on a person's right to seek judicial review of any removal order. The FRB also supports this amendment.

Sec. 105. Repeal of Intrastate Branch Capital Requirements.

SUMMARY: This provision would amend section 5155(c) of the Revised Statutes of the United States (12 U.S.C. § 36(c)) to repeal the requirement that a national bank, in order to establish an intrastate branch in a state, must meet the capital requirements imposed by the state on state banks seeking to establish intrastate branches.

OCC COMMENTS: The OCC supports this technical amendment to repeal the obsolete capital requirement for the establishment of intrastate branches by national banks. This amendment passed the House on October 9, 1998 in section 306 of H.R. 4364, the Depository Institution Regulatory Streamlining Act of 1998, and was also included in later legislation introduced in the

House. This requirement is not necessary for safety and soundness. Branching restrictions are already imposed under other provisions of law to limit the operations of a bank if it is in troubled condition. See 12 U.S.C. § 1831o(e) (prompt corrective action).

Sec. 106. Repeal of the Requirement that Notice of Bank Mergers Be Waived by the Shareholders with the Approval of the Comptroller of the Currency So As to Allow Either to Waive Notice.

SUMMARY: This section would amend sections 2(a) and 3(a)(2) of the National Bank Consolidation and Merger Act (12 U.S.C. § 215(a) and 215a(a)(2), respectively) concerning the newspaper publication requirement of a shareholder meeting to vote on a consolidation or merger of a national bank with another bank located within the same state. This change would clarify that the publication requirement may be waived by the Comptroller in the case of an emergency situation or by unanimous vote of the shareholders of the national or state banks involved in the transaction.

This amendment does not affect other requirements in the law. The current law also requires that the consolidation or merger must be approved by at least a 2/3 vote of the shareholders of each bank involved in the transaction. In addition, the shareholders of the banks generally must receive notice of the meeting by certified or registered mail at least ten days prior to the meeting. These provisions are not changed.

OCC COMMENTS: The OCC supports this amendment. The amendment would clarify the intent of the statute and remove any ambiguity as to its meaning.

TITLE IV -- DEPOSITORY INSTITUTION PROVISIONS

Sec. 401. Easing Restrictions on Interstate Branching and Mergers.

SUMMARY: This section would amend section 5155(g) of the Revised Statutes of the United States (12 U.S.C. § 36(g)), section 18(d)(4) of the FDIA (12 U.S.C. § 1828(d)(4)), section 9 of the Federal Reserve Act (12 U.S.C. § 321), and section 3(d)(1) of the Bank Holding Company Act (BHCA) (12 U.S.C. § 1842(d)(1)) to ease certain restrictions on interstate banking and branching. Under the Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994 (Riegle-Neal Act), an out-of-state national or state bank may establish a de novo branch in a state only if that state has adopted legislation affirmatively "opting in" to de novo branching. This amendment would repeal the requirement that a state expressly must adopt an "opt-in" statute to permit the de novo branching form of interstate expansion.

In addition, the Riegle-Neal Act permits a state to prohibit an out-of-state bank or bank holding company from acquiring an in-state bank that has not been in existence for up to five years. This amendment also would repeal the state age requirement.

In addition, the amendment would amend the FDIA to authorize consolidations or mergers between an insured bank and a noninsured bank with different home states and amend national banking law relating to consolidations or mergers between noninsured national banks and other noninsured banks with different home states.

OCC COMMENTS: The OCC supports the changes to the law to remove the restrictions on interstate de novo branching. Enactment of this amendment should enhance competition in banking services with resulting benefits for bank customers. Moreover, it would ease burdens on banks that are planning interstate expansion through branches and would give banks greater flexibility in formulating their business plans and in making choices about the form of their interstate operations.

Under the Riegle-Neal Act, interstate expansion through bank mergers generally is subject to a state "opt-out" that had to be in place by June 1, 1997. While two states "opted out" at the time, interstate bank mergers will be permissible in all 50 states after September 2001. By contrast, de novo branching by banks requires states to pass legislation to affirmatively "opt-in" to permit out-of-state banks to establish new branches in the state. This requires banks in many cases to structure artificial and unnecessarily expensive transactions in order for a bank to simply establish a new branch across a state border. However, Federal thrifts are not similarly restricted and generally may branch interstate without the state law "opt-in" requirements that are imposed on banks.

In addition, the OCC supports the amendments that would repeal the state age requirement. This additional limitation on bank acquisitions by out-of-state banking organizations is no longer necessary if interstate de novo branching is permitted.

Sec. 402. Statute of Limitations for Judicial Review of Appointment of a Receiver for Depository Institutions.

SUMMARY: This provision would amend section 2 of the National Bank Receivership Act (12 U.S.C. § 191) and section 11(c)(7) of the FDIA (12 U.S.C. § 1821(c)(7)) to provide for a 30-day period to judicially challenge a determination by the OCC to appoint a receiver for a national bank under the National Bank Receivership Act or by the FDIC to appoint itself as receiver under the FDIA under certain conditions. Current law generally provides that challenges to a decision by the OTS to appoint a receiver or conservator for an insured savings association or the FDIC to appoint itself as receiver or conservator for an insured state depository institution must be raised within 30 days of the appointment. 12 U.S.C. §§ 1464(d)(2)(B), 1821(c)(7). There is, however, no statutory limit on a national bank's ability to challenge a decision by the OCC to appoint a receiver of an insured or uninsured national bank.[2] As a result, the general six-year statute of limitations for actions against the U.S. applies to the OCC's receiver appointments. See James Madison, Ltd. v. Ludwig, 82 F.3d 1085 (D.C. Cir. 1996).

[2] Under current law, there is a 20-day statute of limitations for challenges to the OCC's decision to appoint a conservator of a national bank. 12 U.S.C. § 203(b)(1).

Moreover, under the FDIA, there are some circumstances under which FDIC may be appointed or appoint itself as receiver or conservator for an insured depository institution that are not specifically subject to the general 30-day judicial review period. As a technical matter, the amendment also would harmonize these provisions in the FDIA with the general 30-day rule.

Finally, the amendment would provide that the changes made in the statute of limitations under these provisions applies with respect to conservators, receivers, or liquidating agents appointed on or after the date of enactment of the new law.

OCC COMMENTS: The OCC supports the amendment to national banking law. This amendment passed the House on October 9, 1998 in section 304 of H.R. 4364, the Depository Institution Regulatory Streamlining Act of 1998, and was also included in later legislation introduced in the House. The six-year protracted time period under current law severely limits the OCC's authority to manage insolvent national banks that are placed in receivership by the agency and the ability of the FDIC to wind up the affairs of an insured national bank in a timely manner with legal certainty. (In the case of an insured national bank that is placed in receivership by the OCC, the FDIC must be appointed the receiver.) This amendment would make the statute of limitations governing the appointment of receivers of national banks consistent with the time period that generally applies to other depository institutions. The amendment would not affect a national bank's ability to challenge a decision by the OCC to appointment a receiver, but simply require that these challenges must be brought in a timely manner and during the same time frame that generally applies to other depository institutions.

Sec. 403. Reduction of Reporting Burdens Relating to Insider Lending.

SUMMARY: This provision would amend section 22(g) of the Federal Reserve Act (12 U.S.C. § 375a) and section 106(b)(2) of the Bank Holding Company Act Amendments of 1970 (12 U.S.C. § 1972(2)) to eliminate certain reporting requirements concerning loans made to insiders. Specifically, the reports that would be eliminated are (1) the report that must be filed with a bank's board of directors when an executive officer of the bank obtains a loan from another bank that exceeds the amount the officer could have obtained from his or her own bank, (2) the supplemental report a bank must file with its quarterly call report identifying any loans made to executive officers during the previous quarter, and (3) an annual report filed with a bank's board of directors by its executive officers and principal shareholders regarding outstanding loans from correspondent banks.

OCC COMMENTS: The OCC supports these amendments. Nothing in these amendments affects the insider lending restrictions that apply to national banks or the OCC's enforcement of those restrictions. Moreover, the OCC believes that it will continue to have access to sufficient information during the examination process to review a national bank's compliance with the insider lending laws. Under the OCC's regulations, national banks are required to follow the FRB's regulations regarding insider lending restrictions and reporting requirements (see 12 C.F.R. § 31.2). The FRB's regulations require member banks to maintain detailed records of all insider lending. In addition, the OCC has the authority under 12 U.S.C. § 1817(k) to require any

reports that it deems necessary regarding extensions of credit by a national bank to any of its executive officers or principal shareholders, or the related interests of such persons.

Sec. 404. Amendment to Provide an Inflation Adjustment for the Small Depository Institution Exception under the Depository Institution Management Interlocks Act.

SUMMARY: This provision would amend section 203(1) of the Depository Institutions Management Interlock Act (DIMIA) (12 U.S.C. § 3202(1)). Under current law, generally a management official may not serve as a management official of any other nonaffiliated depository institution or depository institution holding company if (1) their offices are located or they have an affiliate located in the same MSA, or (2) the institutions are located in the same city, town, or village, or a city, town, or village that is contiguous or adjacent thereto. For institutions of less than $20 million in assets, the SMSA restriction does not apply. The amendment would increase the current $20 million exemption to $100 million.

OCC COMMENTS: The OCC supports this amendment. This $20 million cap has not been amended since the current law was originally enacted in 1978. However, the asset size of FDIC-insured commercial banks between 1976 and 2000 has increased over five fold. Depository institutions of all sizes will continue to be subject to the city, town, or village test.

Sec. 405. Repeal of Limitation on Dealing in and Underwriting Securities and Stocks by State Member Banks.

The OCC has been advised that this section will not be included in the bill as introduced.

Sec. 406. Enhancing the Safety and Soundness of Insured Depository Institutions.

SUMMARY: This provision would add a new section to the FDIA (12 U.S.C. § 1811, et seq.) to provide that the Federal banking agencies may enforce (1) conditions imposed in writing, and (2) written agreements, in which an IAP agrees to provide capital to the depository institution. The amendment also would clarify the existing authority of the FDIC as receiver or conservator to enforce written conditions or agreements entered into between insured depository institutions and IAPs.

Finally, the amendment would amend section 18(u) of the FDIA (12 U.S.C. § 1828(u)). This section of the law provides that certain transfers to depository institutions to bolster their capital cannot be reversed under the Bankruptcy Code or other law if the affiliate or controlling shareholder making the transfer later becomes bankrupt. The amendment would delete the requirement that the insured depository institution had to be undercapitalized at the time of the transfer for the transfer to be protected under this provision.

OCC COMMENTS: The OCC supports this change to the law. This amendment enhances the safety and soundness of depository institutions and protects the deposit insurance funds from

unnecessary losses. This amendment is intended to reverse some court decisions that question the authority of the agencies to enforce such conditions or agreements without first establishing that the IAP was unjustly enriched. In addition, the amendment would enhance safety and soundness by protecting the capital of insured depository institutions.

Sec. 407. Authorization for Identification and Criminal Background Check.

The OCC has been advised that this section will not be included in the bill as introduced.

TITLE VI -- BANKING AGENCY PROVISIONS

Sec. 601. Waiver of Examination Schedule in Order to Allocate Examiner Resources.

SUMMARY: This section would amend section 10(d) of the FDIA (12 U.S.C. § 1820(d)) to provide that an appropriate Federal banking agency may make adjustments in the examination cycle for an insured depository institution if necessary for safety and soundness and the effective examination and supervision of insured depository institutions. Under current law, insured depository institutions must be examined by their appropriate Federal banking agencies at least once during a 12-month period in a full-scope, on-site examination unless an institution qualifies for the 18-month rule. Small insured depository institutions with total assets of less than $250 million and that satisfy certain other requirements may be examined on an 18-month basis rather than a 12-month cycle. The amendment would permit the banking agencies to make adjustments in the scheduled examination cycle as necessary for safety and soundness.

OCC COMMENTS: The OCC supports this amendment. It would give the appropriate Federal banking agencies the discretion to adjust the examination cycle of insured depository institutions to ensure that examiner resources are allocated in a manner that provides for the safety and soundness of insured depository institutions. For example, as deemed appropriate by a Federal banking agency, a well-capitalized and well-managed bank's examination requirement for an annual or 18-month examination could be extended if the agency's examiners were needed to immediately examine troubled institutions. This amendment would permit the agencies to use their resources in the more efficient manner.

Sec. 602. Credit Card Accounts Permitted for Bank Examiners on Same Terms as Other Consumers.

SUMMARY: This section would amend section 212 of title 18 of the United States Code (18 U.S.C. § 212) to permit bank examiners who examine the institutions to receive credit cards from any depository institution, including the ones that they examine, subject to the requirement that the credit terms and conditions are no more favorable than those generally offered to other consumers. 18 U.S.C. §§ 212 and 213 currently prohibit financial institutions from granting a loan to a bank examiner that examines or has the authority to examine the institution and

prohibits such an examiner from accepting the loan. This prohibition on loans applies to credit cards.

OCC COMMENTS: The OCC supports this change to the law. In light of recent consolidations within the banking industry, bank examiners, particularly those who examine credit card banks, are finding it increasingly difficult to obtain nationally available credit cards without violating the Federal conflict of interest statutes. The requirement in the amendment that the credit terms cannot be more favorable than those offered to other consumers would prevent an examiner from negotiating for better terms and conditions and, thus, eliminates the potential for abuse of an examiner's position or a conflict of interest.

Sec. 603. Interagency Data Sharing.

SUMMARY: This section would amend section 7(a)(2) of the FDIA (12 U.S.C. § 1817(a)(2)). The amendment would provide that a Federal banking agency has the discretion to furnish any confidential supervisory information, including a report of examination, about a depository institution or other entity examined by the agency to another Federal or state supervisory agency that has regulatory authority and to any other IAP or entity deemed appropriate. Similar changes are also made to the Federal Credit Union Act.

OCC COMMENTS: The OCC supports the intent of this provision. This provision is intended to give the other Federal banking agencies the same authority to share confidential information that was given to the FRB in section 727 of the Gramm-Leach-Bliley Act (GLBA). To avoid confusion, however, we recommend that the language of this amendment track the GLBA language more closely.

Sec. 604. Unauthorized Participation by Convicted Individual at Uninsured Depository Institutions Subject to Penalty.

SUMMARY: This section would amend section 19 of the FDIA (12 U.S.C. § 1829) to give the Federal banking agencies the authority to prohibit a person convicted of a crime involving dishonesty or a breach of trust from participating in the affairs of an uninsured national or state bank or uninsured branch, agency, or commercial lending company of a foreign bank. Under current law, the ability of the banking agencies to keep these bad actors out of depository institutions applies only to *insured* depository institutions.

OCC COMMENTS: The OCC supports this change to the law. The amendment will help to provide for the safe and sound operations of uninsured, as well as insured, institutions.

Sec. 605. Amendment Permitting the Destruction of Old Records of a Depository Institution by the FDIC After the Appointment of the FDIC as Receiver.

SUMMARY: This provision would amend section 11(d)(15)(D) of the FDIA (12 U.S.C. § 1821(d)(15)(D)) to modify the record retention requirement of old records that must be maintained by the FDIC after a receiver is appointed for a failed insured depository institution. Under current law, the FDIC must preserve all records of a failed institution for six years from the date a receiver is appointed. This requirement is not dependent on the actual age of the records at the time the receiver is appointed. After the six-year period, the FDIC may destroy any unnecessary records, unless directed to retain the records by a court or a government agency or otherwise prohibited from destroying the records by law. The amendment would permit the FDIC to destroy unnecessary records that are 10 or more years old on the date the receiver is appointed unless prohibited from doing so by a court, a government agency, or law.

OCC COMMENTS: The OCC supports this change and recommends that a similar provision be included in national banking law. The OCC appoints receivers for all national banks, both insured and uninsured. The FDIC only is required to accept the appointment for insured national banks. Thus, a receiver for an uninsured national bank would not be the FDIC. Adding a similar provision to national banking law also would clarify for a receiver of a national bank, other than the FDIC, that these outdated records may be destroyed.

Sec. 606. Modernization of FDIC Recordkeeping Requirement.

SUMMARY: This section would amend section 10(f) of the FDIA (12 U.S.C. § 1820(f)) to provide that the FDIC may retain any records in electronic or photographic form and that such documents shall be deemed to be an original record for all purposes, including as evidence in court and administrative proceedings.

OCC COMMENTS: The OCC supports this amendment and recommends that it be expanded to apply to all of the Federal banking agencies.

Sec. 607. Repeal of Minimum Antitrust Review Period with the Agreement of the Attorney General.

SUMMARY: This provision would amend section 11(b)(1) of the BHCA (12 U.S.C. § 1849(b)(1)) and section 18(c)(6) of the Bank Merger Act (BMA) (12 U.S.C. § 1828(c)(6)) to permit the shortening of the post-approval waiting period for certain bank acquisitions and mergers. Under current law, the post-approval waiting period generally is 30 days from the date of approval by the appropriate Federal banking agency. The waiting period gives the Attorney General time to take action if the Attorney General determines that the transaction will have a significant adverse effect on competition. The waiting period under both the BHCA and BMA, however, may be shortened to 15 days if the appropriate banking agency and the Attorney General agree that no such effect on competition will occur. The proposed amendment would

eliminate the mandatory 15-day waiting period and allow the banking agency to shorten the waiting period to any period less than 30 days as long as the Attorney General concurs.

OCC COMMENTS: The OCC supports this change. It will give the banking agency and the Attorney General the flexibility to shorten the post-approval waiting period as appropriate for those transactions that do not raise competitive concerns. If such concerns exist, the 30-day waiting period will continue to apply. This change will not affect the waiting periods for transactions that involve bank failures or emergencies. In those cases, the statute already provides for other time frames.

Sec. 608. Clarification of Extent of Suspension, Removal, and Prohibition Authority of Federal Banking Agencies in Cases of Certain Crimes by Institution-Affiliated Parties.

SUMMARY: This provision would amend section 8(g) of the FDIA to clarify that the appropriate Federal banking agency may suspend or prohibit IAPs charged with or convicted of certain crimes (including those involving dishonesty, breach of trust, or money laundering) from participating in the affairs of any depository institution and not only the institution with which the party is or was last affiliated. Importantly, the amendment would also clarify that the section 8(g) authority applies even if the IAP is no longer associated with any depository institution at the time the order is considered or issued or the depository institution with which the IAP was associated is no longer is existence.

Under current law, if an IAP is charged with such a crime, the suspension or prohibition will remain in effect until the charge is finally disposed of or until terminated by the agency. If the individual is convicted of such a crime, the party may be served with a notice removing the party from office and prohibiting the party for further participating in the affairs of a depository institution without the consent of the appropriate Federal banking agency. Before an appropriate Federal banking agency may take any of these actions under section 8(g), the agency must find that service by the party may pose a threat to interests of depositors or impair public confidence in a depository institution. The statute further provides that an IAP that is suspended or removed under section 8(g) may request a hearing before the agency to rebut the agency's findings. Unless otherwise terminated by the agency, the suspension or order of removal remains in effect until the hearing or appeal is completed. Current law, however, applies only to the depository institution with which the IAP is associated.

OCC COMMENTS: The OCC supports the amendment to the FDIA. This amendment will help to ensure that, if a Federal banking agency makes the required findings, the agency has adequate authority to suspend or prohibit an IAP charged with or convicted of such crimes from participating in the affairs of any depository institution.

Sec. 609. Streamlining Depository Institution Merger Application Requirements.

SUMMARY: This section would amend the BMA (12 U.S.C. § 1828(c)). The amendment would provide that the responsible agency in a merger transaction, which is generally the Federal

banking agency that has the primary regulatory responsibility for the resulting bank, must request a competitive factors report only from the Attorney General, with a copy to the FDIC. Under current law, this report must be requested from all of the other Federal banking agencies but the other agencies are not required to file a report.

OCC COMMENTS: The OCC supports this amendment. It appropriately streamlines the agencies' procedures in processing BMA transactions.

Sec. 610. Inclusion of Director of the Office of Thrift Supervision in List of Banking Agencies Regarding Insurance Customer Protection Regulations.

SUMMARY: This provision would amend section 47(g)(2)(B)(i) of the FDIA (12 U.S.C. § 1831x(g)(2)(B)(i)) to add OTS to the list of the Federal banking agencies that must jointly make certain determinations before certain state customer protection laws may be preempted. Under current law, OTS is one of the Federal banking agencies that is required to adopt the Federal regulations that would provide the basis for the preemption determination but is not included in the agencies that must make the preemption determination.

OCC COMMENTS: The OCC does not object to this provision.